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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 122

HARRY NORMAN BALL, TRUSTEE,
Appellant,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION OPPOSING JURISDICTION AND MOTION TO DISMISS.

ALBERT C. BICKFORD,
LOUIS PHILLIPS,
GEORGE G. GALLANTZ,
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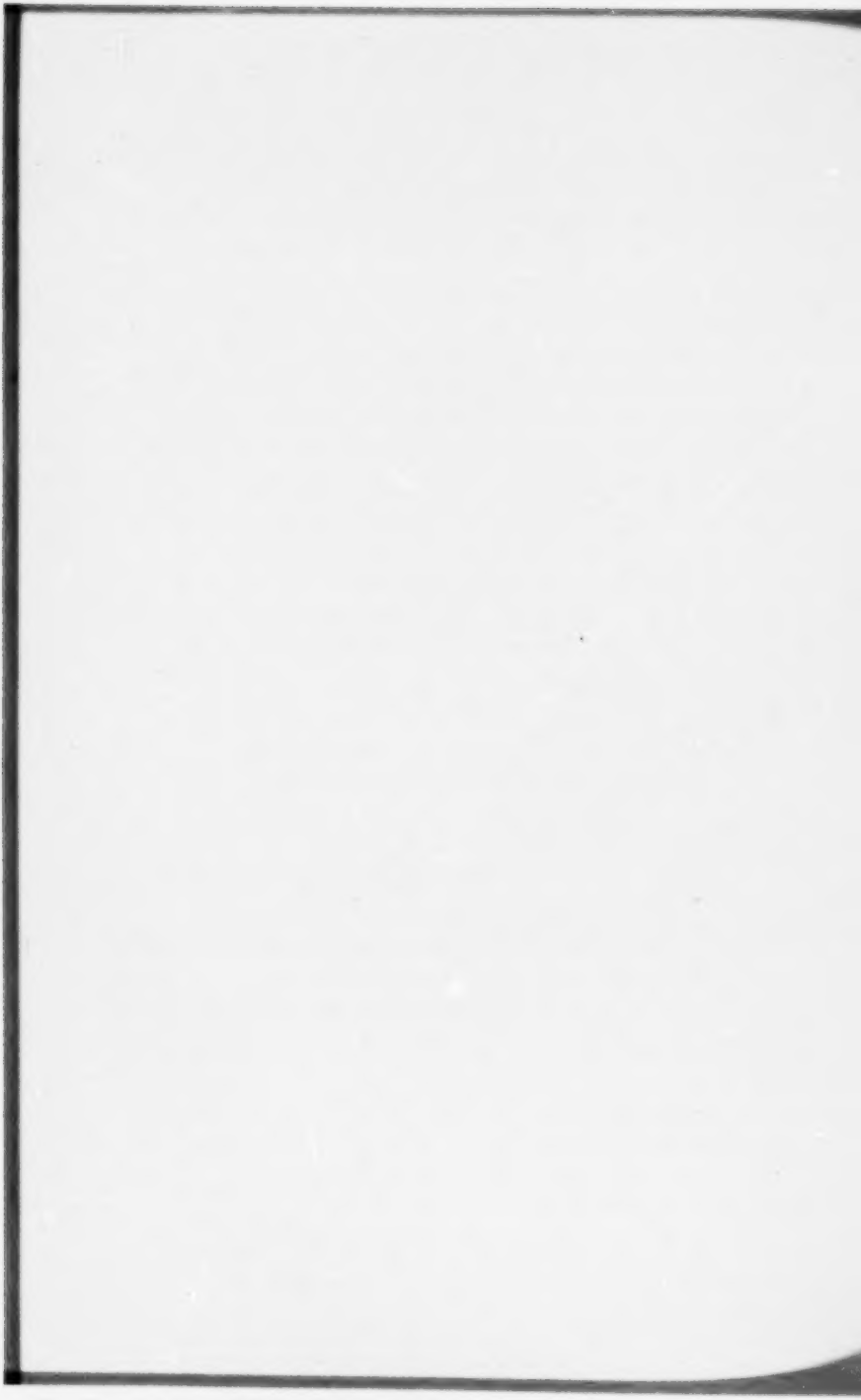

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 122

HARRY NORMAN BALL, TRUSTEE,
Appellant,

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PARAMOUNT PICTURES, INC., ET AL.,
Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT, PURSUANT TO RULE 12, PARAGRAPH 3, OF THE RULES OF THIS COURT, BY PARAMOUNT PICTURES INC. AND PARAMOUNT FILM DISTRIBUTING CORPORATION, IN OPPOSITION TO JURISDICTION.

Paramount Pictures Inc. and Paramount Film Distributing Corporation, pursuant to Rule 12, paragraph 3, of the Rules of this Court, submit the following statement

of the matters and grounds which make against the jurisdiction of this Court asserted by the appellant:

Facts

The appellant, Ball, owns a theatre known as the Penn Theatre, located in Ambridge, Pennsylvania. Pennware Theatre Corporation, in which the appellee, Paramount Pictures Inc. holds a 50% stock interest, owns a theatre known as the State Theatre, located in the same city. In 1944, Ball brought an action in the United States District Court for the Western District of Pennsylvania for an injunction and to recover treble damages under the anti-trust laws. The defendants named were Paramount Pictures Inc., Pennware Theatre Corporation and others including three motion picture distributors: RKO, 20th Century Fox and Loew's. Ball's claim in that action was that Paramount and the three other motion picture distributors named as defendants had conspired to deprive the Penn Theatre of half of the first-run feature motion picture product of RKO, 20th Century Fox and Loew's, and of all the product of Paramount. The trial of that action resulted in a dismissal of the complaint on August 30, 1946 (*Ball* v. *Paramount Pictures*, 67 F. Supp. 1).

Ball appealed to the Circuit Court of Appeals for the Third Circuit. On July 21, 1948, the Court of Appeals, Judge Goodrich dissenting with opinion, reversed and remanded the cause to the District Court with directions to enter a decree in favor of Ball and for the injunctive relief sought by him (*Ball* v. *Paramount Pictures*, 169 F. 2d 317). On December 13, 1948, the District Court, on remand, entered a decree containing various injunctive provisions including an injunction prohibiting the defendants from licensing their feature motion pictures for first-run performance in Ambridge without giving Ball an oppor-

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tunity to inspect and negotiate for pictures, equal to the opportunity afforded any other exhibitor (CCH Trade Reg. Service, para. 62,384).

On December 20, 1948, Ball filed a notice of appeal to the Court of Appeals for the Third Circuit. That appeal is scheduled to be argued in May, 1949. Ball has already filed his brief and has asked for a modification of the District Court decree so as to compel the motion picture distributors to grant franchises to him and so as to enjoin the defendants from operating the State Theatre as a motion picture theatre and from selling the State Theatre to any person without giving notice to Ball and an opportunity to Ball to object and to be heard.

On May 3, 1948, this Court decided *United States* v. *Paramount Pictures Inc., et al.*, 334 U. S. 131. It was there decided that the appellees herein had violated the Sherman Act (26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2) in a number of respects. On the question of the relief to be decreed, this Court affirmed in part and reversed in part the judgment of the three-judge District Court for the Southern District of New York, and remanded the cases to that court for proceedings in conformity with this Court's opinion.

During the proceedings before the District Court on this Court's remand, the Government and Paramount undertook negotiations looking toward the entry of a consent judgment which would settle the remaining issues as between them. After lengthy and complicated negotiations, an agreement was reached and a proposed consent judgment was prepared for submission to the District Court. This is the judgment which the District Court signed on March 3, 1949. It contains provisions embodying all those provisions of the original decree which had been affirmed by this Court.

In addition, it requires Paramount to terminate joint ownerships in all but nine theatres, those nine being theatres in which the other joint owners were solely investors and not potential competitors. On the question of divestiture, the judgment requires Paramount to divest itself of all its interest in some 774 theatres (all specifically named or identifiable from the language in the judgment) and requires that Paramount's theatres be divorced from its production and distribution facilities. The latter requirement is to be effected by the dissolution of Paramount Pictures Inc. and by the creation of two new corporations, one of which will take over all Paramount's remaining theatres in the United States and the other of which will acquire Paramount's other assets.

Specifically, Section III, subsection A, paragraph 9, of the consent judgment enjoins Paramount Pictures Inc., from acquiring or continuing to own in conjunction with any actual or potential independent exhibitor any beneficial interest in motion picture theatres. The said paragraph contains a list of theatres in which such ownership now exists and this list includes the State Theatre in Ambridge, Pennsylvania. The same paragraph also provides that the existing joint ownership in these theatres must be terminated within three years from the date of entry of the judgment.

Nothing in the consent judgment purports to prevent the Pennsylvania District Court or the Court of Appeals for the Third Circuit from passing upon the merits of the appeal now pending before the latter court. Its jurisdiction to grant or deny the drastic relief now being asked remains unaffected by the consent judgment. Nevertheless the appellant, Ball, appeared before the three-judge District Court for the Southern District of New York and orally applied for leave to file a brief. No written notice was ever served or

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filed. Although he never made clear exactly what relief he sought from that court, and although he did not claim the right to intervene, the appellant indicated a desire to have the consent judgment modified in a manner apparently designed to aid him in the litigation now pending in Pennsylvania.

In the course of lengthy argument, counsel for Ball stated: "Whether we are permitted to intervene, • • • I think, is of no particular consequence. We are here and your Honors have graciously allowed us to be heard. We have a motion to present, if it is acceptable, for leave to file a printed brief in support of the few remarks I am permitted to say this afternoon. I say, whether that is done by intervention or whether just by graciousness of your Honors is of no particular importance right now."

Later, when the court pressed counsel to state the relief which he desired, he said: "The least that we could hope to do is ask your Honors to eliminate reference to the State Theatre from this decree." And later: "the minimum that we should ask is that any reference to our case or our situation be deleted from this decree."

At the conclusion of appellant's argument, the Court orally denied the appellant's request for leave to file a brief.

It is difficult to imagine what appellant would have accomplished, had he succeeded in convincing the court that mention of the State Theatre in Ambridge, Pennsylvania should be stricken from the consent judgment. Such action would have left Paramount free to continue indefinitely to own a 50% interest in Pennware Theatre Corporation which operates the State Theatre. The judgment, as it stands, permits Paramount to do so for a maximum of three years, at the end of which period it must dispose of its interest in the State Theatre.

In any event, the argument by the appellant ignored the

fact that the proposed judgment was the product of agreement between the Government and the Paramount defendants, and erroneously assumed that this agreement could be modified on motion of a non-party.

The judgment, in the form consented to by the Government and the Paramount defendants, was then signed and entered by the court. It contained a provision that the judgment was to be of no force or effect unless the proposed reorganization was approved by Paramount's stockholders prior to April 19, 1949. Pursuant to that provision Paramount prepared a plan of reorganization designed to carry out the terms of the judgment and submitted the plan to its stockholders. That procedure necessitated extensive effort and expense, including the preparation of literature to be sent to all stockholders, the submission of such literature to the Securities and Exchange Commission for its approval, and the circulation of the literature to over 34,000 stockholders preparatory to a special stockholders' meeting scheduled to take place on April 12, 1949. That meeting has since been held and, on that date, holders of 78.2% of the outstanding stock of Paramount Pictures Inc. approved the plan of reorganization. Holders of only 1.15% of the outstanding stock cast votes in opposition.

Although in form this appeal seeks a review only of the action of the lower court, in practical effect the appellant would have this Court add new terms to an agreement between the Government and the Paramount defendants after the details of that agreement have been passed upon and approved by an overwhelming majority of the corporation's stockholders.

No Appeal Lies From the Denial of the Appellant's Application for Leave to File a Brief. The Questions Presented Are Not Substantial.

In his Petition for Appeal and Statement as to Jurisdiction the appellant asserts that the lower court denied his motion to intervene. The record reveals that no such motion was ever made by the appellant but that, in fact, his application was confined only to a prayer for leave to file a brief. Indeed, the record makes it clear that the appellant in the lower court did not assert any right whatever but, instead, appealed only to the discretion of the court below.

However, even if the action of the court below is assumed to have amounted to a denial of a motion for leave to intervene, the result would be the same. The present appeal would then in all respects be similar to an appeal taken from the denial of a previous application for leave to intervene in this same case. It will be recalled that prior to the contested decree which was reviewed by this Court in *United States* v. *Paramount Pictures Inc., et al.*, 334 U. S. 131, the parties had consented to a decree which contained provision for the arbitration of disputes arising in the motion picture industry (see 334 U. S. at p. 176). In *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680, the appellants had sought leave to intervene in the District Court, asserting that they were aggrieved by the operation of the arbitration system. The relief they sought was, among other things, that the consent decree be vacated in so far as it had created the arbitration system. Leave to intervene was denied and an appeal to this Court was docketed. This Court dismissed the appeal for want of jurisdiction, citing *United States* v. *California Canneries*, 279 U. S. 553, 556 and cases cited; *Allen Co.* v. *Cash Register Co.*, 322 U. S. 137, 142.

To the same effect, see *Jewel Incandescent Lamp Co., Inc.* v. *General Electric Co.*, 318 U. S. 746.

In the *California Canneries* case, *supra*, Armour & Co. had entered into a contract whereby it had agreed to buy from California Canneries large quantities of canned fruit. Subsequently it consented to an antitrust decree prohibiting it from engaging in the business of selling canned fruit. Canneries moved for leave to intervene, alleging its contract, and asked that the consent decree be vacated. The Supreme Court of the District of Columbia denied the motion but the Court of Appeals reversed and granted leave to intervene. This Court reversed and, in the course of its opinion, criticized the Court of Appeals for having ignored "the decisions which hold that an order denying leave to intervene is not appealable, *In re Cutting*, 94 U. S. 15; *Credits Commutation Co.* v. *United States*, 177 U. S. 311; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581; *In re Engelhard*, 231 U. S. 646; *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219; *New York* v. *New York Telephone Co.*, 261 U. S. 312".

In the *Allen Co.* case, *supra*, National Cash Register Company had been restrained, pursuant to an antitrust decree, from acquiring control of competitors. Years later, it moved in the District Court for an order permitting it to acquire stock of a competitor. Allen Co. moved for leave to intervene and the District Court denied the motion. On the appeal to this Court, the provisions of Rule 24 of the Rules of Civil Procedure were analyzed and it was held that the appellant could not have intervened as of right. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, which is relied upon by the appellant here to sustain jurisdiction, was cited and distinguished upon the ground that, there, the appellant's right to intervene had been preserved in the original decree.

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With respect to the exercise of the District Judge's discretion in denying leave to intervene in the *Allen Co.* case, this Court held that the order was "but an order in the cause and not the final judgment. • • • It was, *inter alia,* to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and that the statute limited the right of appeal to final decrees".

The authority of the *St. Louis Amusement Co.* case, *supra,* and of the cases there relied upon by the Court, thus clearly requires that the instant appeal be dismissed upon the grounds that the District Court's order denying the appellant's motion for leave to file a brief was not final and that no substantial question is presented requiring review by this Court.

WHEREFORE, the appellees Paramount Pictures Inc. and Paramount Film Distributing Corporation respectfully ask that the appeal herein be dismissed.

April 18, 1949.

Respectfully Submitted,

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Paramount Pictures Inc. and
Paramount Film Distributing Corporation.

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